

**LIBRARY**  
**SUPREME COURT, U. S.**

Office-Supreme Court, U.S.  
FILED  
AUG 20 1963  
JOHN F. DAVIS, CLERK

IN THE

**Supreme Court of The United States**

**389**

No. \_\_\_\_\_

DEPARTMENT OF REVENUE ..... PETITIONER

v.

JAMES B. BEAM DISTILLING COMPANY ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF KENTUCKY

JOHN B. BRECKINRIDGE  
Attorney General  
Commonwealth of Kentucky

WILLIAM S. RILEY  
Assistant Attorney General  
Commonwealth of Kentucky

HAL O. WILLIAMS  
PAUL D. ROSS  
FRANCIS D. BURKE

ATTORNEYS FOR PETITIONER  
Department of Revenue  
Frankfort, Kentucky

## INDEX

	Page
Opinions below .....	1
Jurisdiction .....	1
Question presented .....	1-2
Statutes involved .....	2-4
Statement .....	5-7
Reasons for granting the writ.....	8-14
Conclusion .....	14-15
Appendix A—Opinion of the Court of Appeals of Kentucky .....	19-23
Appendix B—Distilled Spirits Institute Report For Year Ending December 31, 1960.....	27

## CITATIONS

### CASES:

	Page
Brown-Forman Co. v. Commonwealth, 125 Ky. 402, 101 S.W. 321 (1907), Aff'd, 217 U.S. 563, 54 L.ed. 883, 30 S. Ct. 578 (1910) -----	13
Carter v. Virginia, 321 U.S. 131, 88 L.ed. 605, 64 S. Ct. 484 (1944) -----	11-12
Commonwealth v. Williams, 287 Ky. 489, 153 S.W. 2d 985 (1941) -----	9
DeBary & Co. v. Louisiana, 227 U.S. 108, 57 L.ed. 441, 33 S. Ct. 239 (1913) -----	13
Gordon v. Texas, 166 Tex. Cr. 24, 310 S.W. 2d 328 (Tex. 1956), Aff'd per curiam, 355 U.S. 369, 2 L.ed. 2d 352, 78 S.Ct. 363 (1958) -----	9
Parrott & Co. v. City and County of San Francisco, 181 Cal. App. 2d 332, 280 P. 2d 881 (1955) -----	14
State v. Board of Review, City of Milwaukee, 15 Wis. 2d 330, 112 N.W. 2d 914 (1962) -----	14
Ziffrin v. Reeves, 308 U.S. 132, 84 L.ed. 128, 60 S. Ct. 163 (1939) -----	8-9

### STATUTES:

<b>United States Constitution</b>	
Art. I, Sec. 10, Cl. 2 -----	2
The Twenty-first Amendment -----	2
<b>United States Statutes</b>	
27 U.S.C.A., Sec. 121 -----	3, 13
28 U.S.C.A., Sec. 1257 (3) -----	1
<b>Kentucky Statutes</b>	
KRS 243.680 (2) -----	3
KRS 243.990 (6) -----	3
<b>Texas Statutes, Vernon's Ann. P.C.</b>	
Art. 666-4, (a) -----	9-10
Art. 666-8 -----	10
Art. 666-17 (32) -----	10
<b>Regulations</b>	
Kentucky Department of Revenue Regulation PN-13 -----	4

IN THE

# Supreme Court of The United States

No. \_\_\_\_\_

DEPARTMENT OF REVENUE ..... *Petitioner*

v.

JAMES B. BEAM DISTILLING COMPANY ..... *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, Commonwealth of Kentucky, by and on relationship of James V. Marcum, Commissioner of Revenue, Commonwealth of Kentucky, prays that a writ of certiorari issue to review a final opinion of the Court of Appeals of Kentucky, the highest appellate court of the Commonwealth of Kentucky, on May 24, 1963.

### OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky was delivered initially on March 1, 1963, and petition for rehearing was overruled by said Court on May 24, 1963. The opinion is attached hereto as "Appendix A" and cited as Ky., 367 S.W. 2d 267.

### JURISDICTION

Jurisdiction is vested in this Court under and pursuant to provisions of Title 28 U.S.C.A., Sec. 1257(3).

### QUESTION PRESENTED

The question presented for review may be stated as follows:

Where a State has imposed a license or occupational tax upon distilled spirits manufactured within the State,

is it within the power of the State, consistent with Art. I, Sec. 10, Cl. 2, of the Constitution of the United States, to place an equal and like tax on distilled spirits imported within the State from a foreign country?

It is the contention of the petitioner that:

(1) KRS 243.680 (2) is not a tax upon the importation of the distilled spirits but is a tax upon the first possession of the distilled spirits within the State and that Art. I, Sec. 10, Cl. 2, of the Constitution, has no application for the reason that the importation is completed at the moment the tax attaches; and

(2) Assuming that the tax is upon importation, it is within the power of the State to tax this particular class of foreign imports.

#### STATUTES INVOLVED

Art. I, Sec. 10, Cl. 2, of the United States Constitution:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States: and all such laws shall be subject to the revision and control of the Congress."

The Twenty-first Amendment, Constitution of the United States:

"Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

## 27 U.S.C.A., Sec. 121:

"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

## KRS 243.680 (2):

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

## KRS 243.990 (6):

"Any person who fails to pay the taxes imposed by KRS 243.680 to 243.700 within fifteen days after they have become due, shall pay a penalty of twenty percent on the amount of the tax due."

Regulation PN-13:

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining an import permit, Revenue Form 548, either tax-paid or tax-free, from the Department of Revenue showing that payment of required taxes has been made.

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department of Revenue, accompanies the shipment of distilled spirits into the state and is delivered to the consignee with the shipment.

"No Kentucky licensee shall receive on his premises any shipment of distilled spirits from any Kentucky licensed transporter, railway company, railway express company, boat line, air express company, or any other type of Kentucky licensed carrier, unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department of Revenue, accompanies the shipment.

"More than one attested carrier's copy of an import permit may be issued by the Department of Revenue if request is included with application.

"Holders of import permits are required to return all carrier's copies to the Department of Revenue within 90 days from date of issuance. Permits not entirely used shall be returned to the department for credit. Failure to send in all carriers' copies of import permits within the 90-day period will necessitate withholding the issuance of additional import permits until all delinquent copies are returned to the department. If a permit is lost, satisfactory evidence shall be furnished the department in lieu of the permit."

## STATEMENT

The General Assembly of the Commonwealth of Kentucky has enacted a comprehensive scheme of taxation and regulation of every facet of the production, transportation and sale of alcoholic beverages. These statutes may be found as Chapter 243 of the Kentucky Revised Statutes.

The facts under dispute may be found on pages 7-10 of the record in the Court of Appeals of Kentucky. We will adopt the respondent's statement of the facts appearing in their brief before the Court of Appeals of Kentucky verbatim. This statement is as follows:

"The facts on which this suit for refund is based are fully stated in the record (R., pp. 7-10). Since they are not in dispute, a brief summary here will suffice.

"The Taxpayer is a licensed distiller under both Federal and State laws. Taxpayer is also the holder of basic import permit (CIN-1-131) under the Federal Alcohol Administration Act, 27 U.S.C. 201-211. Its chief import is a brand of Scotch whiskey known as 'Gilbey's Spey Royal' for which it has the sole distributorship in the United States under a contract with the producer, W. A. Gilbey Ltd. of London, England, and Glasgow, Scotland.

"The whiskey is received by the Taxpayer at its Kentucky plant at Clermont, Kentucky as a direct import from Glasgow, Scotland and then sold by Taxpayer to its customers in the domestic markets through-out the United States.

"Before it can bring the whiskey into Kentucky, Taxpayer is required to apply for the permits provided for in K.R.S. 243.680 (2) and Regulation PN-13 (*supra*); and as a condition precedent to the issuance of the permit the Taxpayer must pay a tax of ten cents per proof gallon for the privilege of making the importation. The language of K.R.S. 243.680 (2) makes it

plain that the incidence of the tax is the act of transporting or shipping the spirits into the state.

"Between the dates of September 1, 1959 and April 1, 1960, Taxpayer imported into Kentucky 51,070.94 proof gallons of Gilbey's Spey Royal Scotch whiskey on which it paid total taxes of \$5,107.09 under the requirements of K.R.S. 243.680 (2).

"Parenthetically, and in order to avoid any confusion as to the question at issue, it needs to be stated at the outset that we are dealing here only with imports of distilled spirits of foreign origin. Imports from other states of the Union of domestically produced products are not here involved.

"Goods transported from one state to another are not 'imports' within the meaning of the Import-Export Clause of the U.S. Constitution. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 89 L.Ed. 1265 (1944).

"According to the report of the Department of Revenue for the fiscal year ending June 30, 1960, the Kentucky import tax yielded a total revenue of \$755,629. Of this amount only a small fraction was derived from the tax on spirits brought into Kentucky from foreign countries.

"A request to the Department of Revenue for the most recent annual figures on the number of gallons of distilled spirits imported into Kentucky from foreign countries brought this reply:

"In response to your phone request we have checked with the Research Staff relative to a breakdown as to the quantity of distilled spirits imported into Kentucky from outside the United States and the quantity imported from other states within the United States.

"We have been informed that the Kentucky wholesalers have submitted to the Department a

breakdown on the types of distilled spirits purchased monthly. Without a verification of the report the clerical staff in the Research Division has been preparing a summary of the reports for submission to the Distilled Spirits Institute.

"Recent cross checking of reports have indicated that some of these reports have been erroneously prepared. A group of the wholesalers have included purchases made from other Kentucky wholesalers, thus creating a duplication on types. For this reason, the Department feels that a further release of summaries on purchases prepared from unverified reports would not be wise."

"As indicated above, the Department of Revenue's Research Division has been supplying the Distilled Spirits Institute of Washington, D. C. monthly reports of distilled spirits purchased by Kentucky wholesalers, broken down as to class and type. From these reports the Distilled Spirits Institute prepares a monthly and year end summary of Kentucky sales by class and type, showing the quantities of spirits of domestic origin and those imported from foreign countries. We have included as an appendix to this brief\* the Distilled Spirits Institute report for the year ending December 31, 1960. This report indicates that the total number of proof gallons of distilled spirits of foreign origin imported into Kentucky for the calendar year 1960 was 201,508 proof gallons. On the basis of ten cents per proof gallon (the tax rate on imported spirits under K.R.S. 243.680 (2)) the total revenue from the import tax on spirits brought in from foreign countries was only \$20,150.80.

"Should the Department of Revenue desire to submit its own estimate of the revenue involved, we will accept as conclusive the Department's calculation, as the difference, if any, can only be slight."

---

\*See Appendix B.

## REASONS FOR GRANTING THIS WRIT

The decision of the Court of Appeals of Kentucky has stricken down an occupational licensing tax on the business of bringing distilled spirits within the Commonwealth, the rectifying, bottling, and selling of such spirits. This tax has been adjudged to violate Art. I, Sec. 10, Cl. 2, of the United States Constitution. The Court of Appeals of Kentucky has stated unequivocally that the tax is a tax on imports.

KRS 243.680 (2) is not a tax on imports. We concede that KRS 243.680 (2), standing alone, would seem to indicate that a tax of ten cents per gallon of whiskey brought into the state must be paid before its introduction into the state. This subsection is, however, but one part of a statutory scheme of taxation. The entire statute must be considered under the *pari materia* doctrine.

KRS 243.990 (6) provides for a penalty if the tax imposed by KRS 243.680 (2) is not paid within fifteen days after the distilled spirits have entered the state. In short, the tax is not mandatorily required to be paid until its introduction into the state is complete.

Common sense construction makes it clear that the legislative intent was that one bringing distilled spirits into the state was not obligated to pay the tax until the distilled spirits had actually arrived in the state and not for fifteen days thereafter. As a matter of regulation and administrative convenience, the Department of Revenue requires the application for and the securing of permits in advance of the importation. In other words, one bringing whiskey into the state from any point outside the state is merely required to give advance notice of the proposed act. He is not required to pay the tax in advance of arrival.

In *Ziffrin v. Reeves, Commissioner of Revenue*, 308 U.S. 132, 84 L.ed. 128, 60 S. Ct. 163 (1939), this Court considered the entire matter of Kentucky's power over the shipment of distilled spirits into its borders. The Commonwealth of Kentucky had provided that any distilled spirits entering Kentucky that did not

follow designated routes of entry and passage would be considered contraband. In sustaining this power this Court said on page 135 of the Lawyers Edition:

"Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less. . . ."

It further states in the opinion:

"... The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce. . . ."

On page 136 the Supreme Court says:

"... The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

The Court of Appeals of Kentucky has heretofore agreed.

Commonwealth v. Williams,  
287 Ky. 153 S.W. 2d 985 (1941)

The respondent has bought the privilege of bringing into Kentucky, and conducting the business of selling, mixing, and handling, the whiskey in question, both in barrels and bottles. The fact that the whiskey may be of foreign origin is of no consequence for the respondent must comply with the rules and regulations under the police and taxing powers of the State.

The only case dealing with the precise factual circumstances here presented is that of Gordon v. Texas, 166 Tex. Cr. 24, 310 S.W.2d 328 (Texas, 1956), Aff'd per curiam, 355 U.S. 369, 2 L.ed.2d 352, 78 S.Ct. 363 (1958).

The Texas Statute, Art. 666-4 (a), Vernon's Ann. P.C., provides:

"It shall be unlawful for any person to manufacture, distill, brew, sell, possess for the purpose of sale, import into this state, export from the state, transport, distribute, warehouse, store, solicit orders for, take orders for, or for the purpose of sale to bottle, rectify, blend, treat, fortify, mix, or process any liquor in any wet area without first having procured a permit of the class required for such privilege."

Art. 666-8 of the same code provides:

"No person shall import into this State any liquor, in excess of one (1) quart, from any source unless a permit be first obtained from the Board, and any person so purchasing or importing liquor in violation of this Section shall be subject to the penalties as hereinafter provided. In addition to the penalties hereinafter provided, any person violating the provisions of this section shall forfeit the liquor so imported to the Board as here provided. . . ."

Art. 666-17 (32) provides:

"... distilled spirits contained in a container having attached thereto the Federal Liquor Strip Stamp or imported from any foreign country are hereby subject to taxation, and must have affixed thereto the appropriate Texas Tax Stamp for distilled spirits."

Gordon had entered the United States from Hidalgo, Mexico, having in his possession eleven bottles, each containing one-fifth gallon of rum, which he had purchased in the Republic of Mexico. The Texas stamp had not been paid; Gordon was transporting the rum to his home in North Carolina. The appellant was convicted, and the Court of Appeals of Texas rejected his contention that his conviction violated Art. 1, Sec. 10, Cl. 2, of the Constitution of the United States. The Court said:

"It is apparent that the tax involved is not an import tax nor a tax upon importation. In fact, the instant tax could not become an import tax because the importation must have been completed before the tax here levied attached."

This Court, in affirming the opinion of the Texas court per curiam, cited the Twenty-first Amendment of the Constitution of the United States and its opinion in *Carter v. Virginia*, 321 U.S. 131, 88 L.ed. 605, 64 S.Ct. 464 (1944).

*Carter v. Virginia*, supra, dealt with the power of the state to regulate intoxicating beverages and the relationship of that power to the Commerce Clause of the United States Constitution, Art. 1, Sec. 8, Cl. 3. The reasoning of Justice Frankfurter as set out in his concurring opinion in this case, however, is pertinent and persuasive here. As he stated at pp. 613 and 614 of 88 L.ed.:

... The Twenty-first Amendment prohibits the transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof, not when the liquor is for delivery *and* use but for 'delivery *or* use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State. . . .

... In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustration of that power by resort to the claim that liquor passing through a State enjoys the protection of the Commerce Clause. If a State may take these protective measures, as surely it may, who is to decide what measures are necessary for its protection? If a State may ask for the posting of a \$1,000 bond, may she not require a \$10,000 bond? If a State should urge that its experience shows that any regulatory system is ineffective because illicit diversion is too resourceful for control by mere regulation and requires prohibition, who is to say, in view of the history embedded in the Twenty-first Amendment, that a State may not fairly act on such a judgment? Are not these peculiarly political, that is legislative, questions which were not meant by the Twenty-first Amendment to continue to be the fruitful apple of judicial discord, as they were before the Twenty-first Amendment?

"6. It is now suggested that a State must keep within 'the limits of reasonable necessity' and 'that

this Court must judge whether or not Virginia has adopted 'regulations reasonably necessary to enforce its local liquor laws.' Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment.

7. Less than six years ago this Court rejected the impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a 'reasonable regulation' of the liquor traffic. The issue was fairly presented in *Mahoney v. Triner Corp.* 304 US 401, 82 L. Ed. 1424, 58 S. Ct. 952. And this was the holding:

"We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market Co.'s Case* (299 US 59) p 62, 81 L. Ed 38, 40, 57 S.Ct. 77, "involve not a construction of the Amendment, but a rewriting of it." 304 US 404, 82 L.Ed. 1427, 58 S. Ct. 952.

•Therefore if a State, in aid of its powers of prohibition, may regulate, without let or hindrance by courts regarding the 'reasonableness' of a regulation, it may do so whether the liquor is openly consigned for consumption within it or intended for consumption there although, by subterfuge too difficult to check, nominally destined elsewhere.

.... And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play. ....

We believe that the foregoing amply demonstrates on logic and reason that the tax imposed by KRS 243.680 (2) is not a tax on an import. Should the Court conclude, however, that the tax is on importation, it is submitted that it was within the power of the State to levy such a tax here.

The Twenty-first Amendment of the Constitution of the United States is nothing more or less than a reaffirmation of the State's powers with regard to alcohol. It creates no new powers but does nothing more than expressly permit a State to write the provisions under which intoxicating beverages may enter its borders.

The Wilson Act, known as the Original Package Act, 27 U.S.C.A., Sec. 121, provides in part as follows:

"All . . . distilled . . . liquors . . . transported into any State . . . shall . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory; and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The power granted to a state to prohibit, regulate, or license the handling of liquors brought into its borders was not made to depend upon whether the spirits were imported from another state or a foreign country in either an original or broken package.

\* DeBary & Co. v. Louisiana,  
227 U.S. 108, 57 L.ed. 441,  
33 S.Ct. 239 (1913)

The tax imposed by KRS 243.680 (2), and the equivalent tax imposed on the manufacture of distilled spirits within the Commonwealth of Kentucky has been construed to be nothing more or less than an occupational licensing tax.

Brown-Forman Co. v. Commonwealth,  
125 Ky. 402, 101 S.W. 321 (1907),  
Aff'd, 217 U.S. 563, 54 L.ed. 883,  
30 S. Ct. 578 (1910)

The force and effect of these constitutional and statutory provisions permit a State to place distilled spirits introduced into its borders on an equal footing with such spirits manufactured within its borders.

The tax here involved is not a tax upon the property. For this reason, all the cases relied upon by the Court of Appeals of Kentucky in striking down this tax are distinguishable for they involve the question of ad valorem property taxation.

Parrott & Co. v. City and County of San Francisco, 131 Cal. App. 2d 332, 280 P. 2d 881 (1955); State v. Board of Review, City of Milwaukee, 15 Wis. 2d 330, 112 N.W. 2d 914 (1962).

It must be borne in mind that Art. I, Sec. 10, Cl. 2, of the Constitution of the United States, merely prohibits states in laying imposts or duties on imports or exports . . . without the consent of Congress. Entirely aside from the Twenty-first Amendment to the Constitution, Congress has, by the Original Package Act, consented to the States making their liquor laws adaptable to all intoxicating beverages, whether imported from a foreign country or not.

### CONCLUSION

The Commonwealth of Kentucky collects ten cents per gallon on every gallon of distilled spirits manufactured within its borders. To permit a strained construction of Art. I, Sec. 10, Cl. 2, of the Constitution of the United States, to place distilled spirits imported from a foreign country in an exemptive or protected class, wholly escaping this facet of the statutory scheme of taxation and regulation, is to sacrifice the domestic industry on the altar of constitutional form.

We submit that the decision of the Court of Appeals of Kentucky misconstrues the effect of Art. I, Sec. 10, Cl. 2, of the Constitution of the United States in its application of the power of the States to regulate and tax foreign imports of whiskey.

We submit further that this Court should grant the petitioner's petition for Writ of Certiorari and that this matter should be heard on its merits.

Respectfully submitted,

JOHN B. BRECKINRIDGE  
Attorney General  
Commonwealth of Kentucky

WILLIAM S. RILEY  
Assistant Attorney General  
Commonwealth of Kentucky

HAL O. WILLIAMS  
PAUL D. ROSS  
FRANCIS D. BURKE

ATTORNEYS FOR PETITIONER  
Department of Revenue  
Frankfort, Kentucky

IN THE  
SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_

DEPARTMENT OF REVENUE ..... PETITIONER

v.

JAMES B. BEAM DISTILLING COMPANY ..... RESPONDENT

APPENDIX A

# Court of Appeals of Kentucky

March 1, 1963

JAMES B. BEAM DISTILLING  
COMPANY -----

*Appellant*

VS.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE HENRY MEIGS, JUDGE

DEPARTMENT OF REVENUE -----

*Appellee*

OPINION OF THE COURT BY  
CHIEF JUSTICE STEWART

REVERSING

This is an appeal by James B. Beam Distilling Company from a judgment of the Franklin Circuit Court upholding a ruling of the Kentucky Tax Commission, which denied appellant's claim for a refund of taxes on distilled liquors. The sum of \$5107.09 was paid to the Department of Revenue between September 1, 1959, and April 1, 1960, under the provisions of KRS 243.680(2), which reads:

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

Appellant's position is this statute is unconstitutional because it conflicts with article 1, section 10, clause 2 of the Constitution of the United States, which reads:

"No State shall, without the consent of the Congress, lay any imports, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imports, laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

Appellant is the sole distributor in the United States of a brand of Scotch whiskey called "Gilbey's Spey Royal." The whiskey is produced in Scotland, received by appellant at its Kentucky plant at Clermont in Nelson County by direct shipment from Scotland, and then sold by it to its customers in the domestic markets throughout this country. The record shows, which is not disputed, that this whiskey is an import; that it has been brought in from another country; and that the tax was collected while the whiskey remained in unbroken packages in the hands of the original importer and prior to resale or use by the importer.

Before appellant can bring this whisky into Kentucky, it must obtain a permit pursuant to KRS 243.680(2)(c); and, as a condition precedent to the issuance of the permit, it must pay a tax of 10c per proof gallon on the whiskey to be imported.

Since the case of *Brown v. Maryland*, 12 Wheat, 419, 25 U. S. 419, 6 L. Ed. 678, the United States Supreme Court has held that the above-quoted constitutional provision, known as the "import-export clause," protects goods imported for sale while they are in their original packages and have not been sold or used by the importer. "Use" by the importer of such goods does not include their storage preparatory to sale. Storage does not cause the goods to lose their character as imports. This is true even if the goods, such as the liquor in the case at bar, will only be sold for delivery in Kentucky. See *State v. Board of Review, City of Milwaukee, et al.*, 15 Wis. 2d 330, 112 N. W. 2d 914.

Even though the tax is denominated as something else, such as an occupational tax (*Brown v. Maryland*, *supra*), an excise tax (*Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 91 L. Ed. 80), or an ad valorem tax (*Hooven & Allison v. Evatt*, 324 U. S. 652, 89 L. Ed. (1252)), if, in fact, it is a tax on imports, as that term is interpreted by the Supreme Court of the United States, the levy is invalid. The tax in the case at bar is an occupational or license tax in form, but appellant maintains it is nevertheless a tax on imports in fact.

Appellee argues that the Twenty-first Amendment to the Constitution of the United States has changed the rule regarding a state's right to tax imports. Section 2 of this amendment reads: "The transportation or importation into any state or territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This point has been dealt with by courts of other jurisdictions.

In the case of *Parrot & Co. v. San Francisco*, Calif., 280 Pac. 2d 881, the City of San Francisco levied and collected an ad valorem property tax on some imported liquor which was still in its original unbroken packages, was stored in separate lots in warehouses and was undisposed of by the original importer by consignment or sale. That court held the second section of the

amendment did not repeal the import-export clause of the Constitution of the United States insofar as intoxicating liquors are concerned. The opinion states:

" \* \* \* The two sections (of the amendment), in their application to foreign imported liquor, are quite clearly complementary. The import-export clause permits the federal government exclusively to regulate and tax all imports from foreign lands, including liquors, as long as they remain imports, but when the importation is completed and the liquor is being transported or imported into one of the states 'for delivery or use therein' the power of the state attaches. The obvious purpose of the 21st amendment was to preserve the intra-state jurisdiction of the states so as to grant constitutional protection to those states desiring to remain or to become 'dry.' "

That court concluded such imported liquor was not subject to the city's ad valorem tax. A similar ruling was handed down by the Supreme Court of Wisconsin in *State v. Board of Review, City of Milwaukee*, *supra*, where the City of Milwaukee undertook to assess for the purpose of city taxation certain wines and liquors imported directly from various foreign countries. That court held that the assessment on the wines and liquors still in the original packages, unconsigned and unsold, violated the import-export clause and was therefore void.

Appellee contends it has authority to impose the tax under the Webb-Kenyon Act. See U. S. C. A., Title 27, Chapter 6. We do not agree. The two sections of this Act bestow upon the several states the power either to prohibit the transportation of any and all liquors into a state, if that particular state happens to be "dry," or to regulate the traffic in liquors within a state, if that particular state is "wet." Clearly this Act does not by its language confer upon a state the right to tax liquors in contravention of the import-export clause of the federal Constitution; furthermore, it was not the purpose of this Act to accomplish that purpose. The case of *Carter v. Virginia*, 321 U. S. 131, 88 L. Ed. 605, relied upon by appellee to sustain its right to levy the tax under consideration, simply does not, in our view, uphold

any such right or imply in any wise that the import-export clause of the Constitution of the United States may be ignored where the taxation of direct imports of foreign origin is involved.

It cannot be said the tax in question is an inspection measure, as appellee seems to suggest. Neither KRS 243.680(2), nor the regulation implementing this statute, provides for actual inspection of the imported whiskey. Actual inspection must be provided for in order that the statute may come under the exception noted in the import-export clause of the federal Constitution. See 29 Am. Jur., Inspection Laws, sec. 4, pp. 369-370. Kentucky makes no independent inspection of imported distilled spirits, but accepts the inspection made by the Alcohol & Tobacco Tax Division of the Bureau of Internal Revenue. See KRS 244.230.

In the final analysis, we conclude the language of KRS 243.680(2) makes it plain the incidence of the tax is the act of transporting or shipping the distilled spirits under consideration into this state. It is our opinion, under the facts presented and under the authority of the Wisconsin and the California cases, extensively referred to above, and the legal principles of both of which we adopt as the law of Kentucky, the whiskey is not subject to the tax collected under KRS 243.680(2). It follows that appellant is entitled to the relief sought, namely, a refund of the amount heretofore paid.

Wherefore, the judgment is reversed and remanded for further proceedings not inconsistent with this opinion.

**ATTORNEY FOR APPELLANT:**

Millard Cox  
1021-1023 Ky. Home Life Bldg.  
Louisville 2, Kentucky

**ATTORNEYS FOR APPELLEE:**

William S. Riley  
Paul D. Ross  
Hal O. Williams  
Department of Revenue  
Capitol Annex  
Frankfort, Kentucky

ORDERS—KENTUCKY COURT OF APPEALS  
WINTER TERM, MARCH 1, 1968

JAMES B. BEAM DISTILLING COMPANY \_\_\_\_\_ *Appellant*

VS.

APPEAL FROM A JUDGMENT OF THE  
FRANKLIN CIRCUIT COURT

DEPARTMENT OF REVENUE \_\_\_\_\_ *Appellee*

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for proceedings not inconsistent with the opinion herein; which is ordered to be certified to said Court.

It is further considered that the appellant recover of the appellee, its costs herein expended.

IN THE  
SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_

DEPARTMENT OF REVENUE ----- PETITIONER

v.

JAMES B. BEAM DISTILLING COMPANY ----- RESPONDENT

APPENDIX B

## APPENDIX B

### APPARENT CONSUMPTION OF DISTILLED SPIRITS BY CLASS AND TYPE

#### LICENSE STATES

Based on gallonage shipments to wholesalers

Wine Gallons

#### KENTUCKY MR-12

DECEMBER 1960

Class and Type	December		Jan.-Dec.		Percent Change Year to Date
	1960	1959	1960	1959	
<b>DOMESTIC WHISKEY</b>					
Bonded Bourbon	131,717	158,412	1,123,970	1,171,796	(- 4.1)
Bonded Rye	5	12	1,067	2,252	(- 51.9)
Straight Bourbon	95,852	94,997	927,152	854,904	8.2
Straight Rye		22	173	364	(- 34.5)
Young Whiskey (under 2 years)	573	371	4,983	3,294	47.1
Blends of Straights	45	229	3,341	8,257	(- 58.5)
Blends of Neutral Spirits	21,439	14,087	224,960	201,796	11.5
Other	501	609	5,510	8,622	(- 36.1)
Total Domestic Whiskey	250,232	368,639	2,291,186	2,253,315	1.7
<b>IMPORTED WHISKEY</b>					
Scotch	14,276	11,777	111,373	101,853	9.3
Canadian	5,714	7,230	72,300	63,727	13.4
Irish	24	46	327	265	22.4
Other		24	760	72	
Total Imported Whiskey	20,014	19,077	184,760	165,827	11.4
<b>TOTAL ALL WHISKEY</b>	<b>270,246</b>	<b>387,716</b>	<b>2,475,946</b>	<b>2,419,242</b>	<b>2.3</b>
<b>GIN</b>					
Domestic	18,012	14,411	276,877	278,255	(- 0.5)
Imported	881	420	7,678	6,488	18.3
<b>TOTAL GIN</b>	<b>18,893</b>	<b>14,831</b>	<b>284,555</b>	<b>284,743</b>	<b>(- 0.1)</b>
<b>RUM</b>					
Puerto Rican	2,786	2,274	17,924	15,965	12.1
Virgin Islands	74	36	165	70	135.7
Other Domestic	20	46	475	809	(- 22.0)
Total Domestic Rum	2,880	2,336	18,564	18,664	11.4
Imported Rum		12	171	523	(- 67.3)
<b>TOTAL RUM</b>	<b>2,880</b>	<b>2,336</b>	<b>18,735</b>	<b>17,187</b>	<b>9.0</b>
<b>BRANDY</b>					
Domestic	967	1,189	31,099	9,130	21.5
Imported	598	442	5,717	4,857	17.7
<b>TOTAL BRANDY</b>	<b>1,565</b>	<b>1,611</b>	<b>36,816</b>	<b>13,987</b>	<b>20.2</b>
<b>VODKA TOTAL</b>	<b>10,781</b>	<b>13,082</b>	<b>152,248</b>	<b>132,584</b>	<b>14.9</b>
<b>CORDIALS AND SPECIALTIES</b>					
Domestic	2,292	5,256	33,586	31,181	7.7
Imported	727	449	3,182	2,986	6.2
<b>TOTAL CORDIALS &amp; SPECIALTIES</b>	<b>3,019</b>	<b>5,705</b>	<b>36,768</b>	<b>34,177</b>	<b>7.6</b>
<b>NOT ELSEWHERE SPECIFIED</b>	<b>278</b>	<b>287</b>	<b>2,543</b>	<b>2,425</b>	<b>4.5</b>
<b>TOTAL DOMESTIC DISTILLED SPIRITS</b>	<b>285,442</b>	<b>305,200</b>	<b>2,786,103</b>	<b>2,723,534</b>	<b>2.3</b>
<b>TOTAL IMPORTED DISTILLED SPIRITS</b>	<b>22,220</b>	<b>20,400</b>	<b>201,508</b>	<b>180,791</b>	<b>11.5</b>
<b>TOTAL ALL DISTILLED SPIRITS</b>	<b>307,662</b>	<b>325,600</b>	<b>2,987,611</b>	<b>2,904,315</b>	<b>2.9</b>